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In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE COMMODITY FUTURES TRADING COMMISSION

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Respondents attempt to portray the court of appeals' decision as "avoiding" the Article III issue (Br. in Opp. 6) and resolving only the statutory question whether the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, authorizes the CFTC to consider state law counterclaims in reparations proceedings. It is true that the court of appeals' decision nominally rests on statutory grounds; but it is evident that the court reached its result solely because of constitutional concerns.

As we demonstrated in the petition (at 13-18), not only was the CFTC's regulation permitting state law counterclaims issued pursuant to what this Court has described as a "broad [grant of] rule-making powers" (*Rice* v. *Board of Trade*, 331 U.S. 247, 252 (1947)), but there is abundant

evidence in both the legislative history and the CEA itself that Congress envisioned that counterclaims would be adjudicated in reparations proceedings.[1] Indeed, as we noted in the petition, the House report on the legislation that established the reparations procedure could not have been more explicit: "Counterclaims will be recognized in [reparations] proceedings but on such terms and under such circumstances as the Commission may prescribe by regulation." H.R. Rep. 93-975, 93d Cong., 2d Sess. 23 (1974).[2] Thus, since the court of appeals' interpretation of the CEA is inconsistent with every other indication of legislative intent and principle of statutory construction, it must be seen as resting on the "[s]erious constitutional problems" that, according to the court of appeals, "attend CFTC adjudication of common law counterclaims" (Pet. App. 33a) and that the court of appeals discussed at very great length (see *id.* at 14a-33a).

In these circumstances, the reliance of the court of appeals on the maxim that a statute should be construed to avoid a constitutional question actually reveals a constitutional ruling. *Cf. United States* v. *Batchelder*, 442 U.S. 114, 122 (1979). The court has interpreted Article III of the Constitution in a way that nullifies a deliberate and considered decision made by Congress — a decision to authorize

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[1]As we explained in the petition (at 17 n.14) the counterclaims brought by brokers in reparations proceedings are invariably state law breach of contract claims for debit balances.

[2]Respondents conspicuously ignore the House report — as well as the other indications of legislative intent — when they assert (*e.g.*, Br. in Opp. 15-16) that Congress did not respond to the testimony, given by witnesses at the hearings on the proposed legislation, that counterclaims should be recognized.

the Commission to entertain state law counterclaims. Because of the practical importance of this constitutional ruling, review by this Court is warranted.[3]

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[3]In the petition, we noted, on the basis of published CFTC annual reports, that the reparations program has, since its inception, received over 8,000 claims that could otherwise have been brought in court. See Pet. 10 & n.7. We did not venture any estimate of the number of such claims that gave rise to state law counterclaims, because there is no published information on that point. But respondents, on the basis of an obviously erroneous computation, assert that "counterclaim cases represent something less than two percent of the cases filed" (Br. in Opp. 11). (Respondents correctly noted that approximately 60 counterclaims were pending as of September 10, 1984. Some of the cases in which counterclaims were pending had docket numbers indicating that they had been filed as early as 1980, and it appears that respondents incorrectly inferred that a total of only 60 counterclaims had been filed in four years. But of course many claims and counterclaims filed between 1980 and 1984 were resolved before September 10, 1984; the 60 pending counterclaims represent far less than four years' total.)

We would note that, according to a CFTC review procedure conducted in the fall of 1984, counterclaims — invariably, as we have noted, state law counterclaims for debit balances — were filed in approximately 12% of the reparations cases pending at that time. Moreover, this figure understates the impact of withdrawing counterclaim jurisdiction from the Commission: as we explained in the petition (at 11-13), customers who *fear* that they may be required to litigate the same facts in two forums will be deterred initially from even invoking the reparations procedure — whether or not a counterclaim is ultimately filed.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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